

TRADEMARK ASSIGNMENT COVER SHEET

Electronic Version v1.1
Stylesheet Version v1.2

ETAS ID: TM556037

SUBMISSION TYPE:	NEW ASSIGNMENT
NATURE OF CONVEYANCE:	MERGER
EFFECTIVE DATE:	09/24/2019

CONVEYING PARTY DATA

Name	Formerly	Execution Date	Entity Type
Wholesome Valley Foods		09/24/2019	Corporation: CALIFORNIA

RECEIVING PARTY DATA

Name:	BARNANA, PBC
Street Address:	302 Washington St.
Internal Address:	Suite 150
City:	San Diego
State/Country:	CALIFORNIA
Postal Code:	92013
Entity Type:	Corporation: DELAWARE

PROPERTY NUMBERS Total: 8

Property Type	Number	Word Mark
Registration Number:	4190163	BARNANA
Registration Number:	4831778	BARNANA
Registration Number:	4899684	CHEWY BANANA BITES
Registration Number:	4985140	BARCOCO
Registration Number:	4985141	BARMANGO
Registration Number:	4985142	BARBERRY
Registration Number:	5445366	THE SUPER BANANA SNACK
Registration Number:	5384480	THE SUPER POTASSIUM SNACK

CORRESPONDENCE DATA

Fax Number: 8583141501

Correspondence will be sent to the e-mail address first; if that is unsuccessful, it will be sent using a fax number, if provided; if that is unsuccessful, it will be sent via US Mail.

Phone: 858-314-1506

Email: adskale@mintz.com, jddib@mintz.com, acromanini@mintz.com, ipdocketingbos@mintz.com

Correspondent Name: Andrew D. Skale

Address Line 1: 3580 Carmel Mountain Road

Address Line 2: Suite 300

TRADEMARK

REEL: 006831 FRAME: 0302

900529702

CH \$215.00 4190163

Address Line 4: San Diego, CALIFORNIA 92130

ATTORNEY DOCKET NUMBER: 043613-001

NAME OF SUBMITTER: Andrew D. Skale

SIGNATURE: /Andrew D. Skale/

DATE SIGNED: 01/06/2020

Total Attachments: 22

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Delaware

The First State

Page 1

I, JEFFREY W. BULLOCK, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF MERGER, WHICH MERGES:

"WHOLESOME VALLEY FOODS", A CALIFORNIA CORPORATION,
WITH AND INTO "BARNANA, PBC" UNDER THE NAME OF "BARNANA, PBC", A CORPORATION ORGANIZED AND EXISTING UNDER THE LAWS OF THE STATE OF DELAWARE, AS RECEIVED AND FILED IN THIS OFFICE ON THE TWENTY-FOURTH DAY OF SEPTEMBER, A.D. 2019, AT 6:57 O`CLOCK P.M.




Jeffrey W. Bullock, Secretary of State

7584864 8100M
SR# 20197204866

You may verify this certificate online at corp.delaware.gov/authver.shtml

Authentication: 203702016
Date: 10-01-19

TRADEMARK
REEL: 006831 FRAME: 0304

STATE OF DELAWARE
CERTIFICATE OF MERGER OF
A FOREIGN CORPORATION INTO A
DOMESTIC CORPORATION

Pursuant to Title 8, Section 252(c) of the Delaware General Corporation Law, the undersigned corporation executed the following Certificate of Merger:

FIRST: The name of the surviving corporation is Barnana, PBC, a Delaware public benefit corporation ("**Barnana**"), and the name of the corporation being merged into this surviving corporation is Wholesome Valley Foods, a California corporation ("**Wholesome Valley**").

SECOND: The Agreement and Plan of Merger (the "**Agreement**") has been approved, adopted, certified, executed and acknowledged by Barnana and Wholesome Valley.

THIRD: The name of the surviving corporation is Barnana, PBC.

FOURTH: The merger is to become effective upon the filing of the Certificate of Merger with the Secretary of State of the State of Delaware (the "**Effective Date**").

FIFTH: The Agreement is on file at 1746 Berkley Street, Unit B, Santa Monica, California 90404, the place of business of Barnana.

SIXTH: A copy of the Agreement will be furnished by Barnana on request, without cost, to any stockholder of any constituent corporation.

SEVENTH: The total authorized capital stock of Wholesome Valley immediately prior to the consummation of the merger is 13,085,943 shares, consisting of 10,000,000 shares of Common Stock, no par value, and 3,085,943 shares of Preferred Stock, no par value, 463,000 of which are designated "Series A Preferred Stock," 383,525 of which are designated "Series B Preferred Stock," 319,418 of which are designated "Series C Preferred Stock," 595,000 of which are designated "Series D Preferred Stock," 250,000 of which are designated "Series D-1 Preferred Stock," 950,000 of which are designated "Series E Preferred Stock" and 125,000 of which are designated "Series E-1 Preferred Stock."

EIGHTH: The certificate of incorporation of Barnana shall be amended and restated such that upon the effectiveness of the filing of the Certificate of Merger the certificate of incorporation in the form attached hereto as Exhibit A shall be the certificate of incorporation of Barnana.

IN WITNESS WHEREOF, Barnana, PBC has caused this Certificate of Merger to be signed by a duly authorized officer, the 24th day of September, 2019.

BARNANA, PBC,
a Delaware public benefit corporation

By: /s/Alfred Multari

Name: Alfred Multari

Title: Chief Executive Officer

Exhibit A

CERTIFICATE OF INCORPORATION

OF

BARNANA, PBC

AMENDED AND RESTATED
CERTIFICATE OF INCORPORATION OF
BARNANA, PBC
A DELAWARE PUBLIC BENEFIT CORPORATION

ARTICLE I

The name of this public benefit corporation is Barnana, PBC (the “*Corporation*”).

ARTICLE II

The address of the registered office of the Corporation in the State of Delaware is 251 Little Falls Drive, in the City of Wilmington, County of New Castle 19808. The name of the registered agent at that address is Corporation Service Company.

ARTICLE III

1. **Purpose.** The purpose of the Corporation is to engage in any lawful act or activity for which a corporation may be organized under the laws of the State of Delaware (particularly Chapter 1, Title 8 of the Delaware Code and the acts amendatory thereof and supplemental thereto, and known, identified and referred to as the “*DGCL*”).

2. **Benefit Corporation.** The Corporation shall be a public benefit corporation as contemplated by subchapter XV of the DGCL, or any successor provisions, that is intended to operate in a responsible and sustainable manner and to produce a public benefit or benefits, and is to be managed in a manner that balances the stockholders’ pecuniary interests, the best interests of those materially affected by the corporation’s conduct and the public benefit or benefits identified in this Amended and Restated Certificate of Incorporation (this “**Restated Certificate**”). If the DGCL is amended to alter or further define the management and operation of public benefit corporations, then the corporation shall be managed and operated in accordance with the DGCL, as so amended.

3. **Specific Purposes.** *As its specific purpose*, the corporation will democratize access to healthier eating options by developing, manufacturing and distributing better for you snacks to communities around the world. We will achieve this by maximizing good and minimizing unnecessary harm. As a result we will source sustainable ingredients, raw materials and products that have minimal adverse impact on the environment and contribute to the wellbeing of the communities they serve.

ARTICLE IV

The total number of shares of all classes of stock that the Corporation shall have authority to issue is 13,085,943 shares, consisting of (i) 10,000,000 shares of Common Stock, \$0.0001 par value per share (“**Common Stock**”), and (ii) 3,085,943 shares of Preferred Stock, \$0.0001 par value per

share (“**Preferred Stock**”), 463,000 of which are designated “**Series A Preferred Stock**,” 383,525 of which are designated “**Series B Preferred Stock**,” 319,418 of which are designated “**Series C Preferred Stock**,” 595,000 of which are designated “**Series D Preferred Stock**,” 250,000 of which are designated “**Series D-1 Preferred Stock**,” 950,000 of which are designated “**Series E Preferred Stock**” and 125,000 of which are designated “**Series E-1 Preferred Stock**.”

The terms and provisions of the Common Stock and Preferred Stock are as follows:

1. **Definitions.** For purposes of this ARTICLE IV, the following definitions shall apply:

(a) “**Conversion Price**” shall mean (i) \$1.00 per share for the Series A Preferred Stock (subject to adjustment from time to time for Recapitalizations and as otherwise set forth elsewhere herein), (ii) \$2.61 per share for the Series B Preferred Stock (subject to adjustment from time to time for Recapitalizations and as otherwise set forth elsewhere herein), (iii) \$3.63 per share for the Series C Preferred Stock (subject to adjustment from time to time for Recapitalizations and as otherwise set forth elsewhere herein), (iv) \$6.7799 per share for the Series D Preferred Stock (subject to adjustment from time to time for Recapitalizations and as otherwise set forth elsewhere herein), (v) \$5.4239 per share for the Series D-1 Preferred Stock (subject to adjustment from time to time for Recapitalizations and as otherwise set forth elsewhere herein), (vi) \$8.4515 per share for the Series E Preferred Stock (subject to adjustment from time to time for Recapitalizations and as otherwise set forth elsewhere herein) and (vii) \$6.7612 per share for the Series E-1 Preferred Stock (subject to adjustment from time to time for Recapitalizations and as otherwise set forth elsewhere herein).

(b) “**Convertible Securities**” shall mean any evidences of indebtedness, shares or other securities convertible into or exchangeable for Common Stock or Preferred Stock, but excluding Options.

(c) “**Corporation**” shall mean Barnana, PBC.

(d) “**Distribution**” shall mean the transfer of cash or other property without consideration whether by way of dividend or otherwise, other than dividends on Common Stock payable in Common Stock, or the purchase or redemption of shares of the Corporation by the Corporation for cash or property other than: (i) repurchases of Common Stock issued to or held by employees, officers, directors or consultants of the Corporation or its subsidiaries upon termination of their employment or services pursuant to agreements providing for the right of said repurchase, (ii) repurchases of Common Stock issued to or held by employees, officers, directors or consultants of the Corporation or its subsidiaries pursuant to rights of first refusal contained in agreements providing for such right, (iii) repurchase of capital stock of the Corporation in connection with the settlement of disputes with any shareholder, and (iv) any other repurchase or redemption of capital stock of the Corporation approved by the holders of the Common and Preferred Stock of the Corporation voting as separate classes.

(e) “**Dividend Rate**” shall mean (i) an annual rate of \$.01 per share for the Series A Preferred Stock (subject to adjustment from time to time for Recapitalizations as set forth elsewhere herein), (ii) an annual rate of \$.01 per share for the Series B Preferred Stock (subject to adjustment from time to time for Recapitalizations as set forth elsewhere herein), (iii) an annual rate of \$.01 per share for the Series C Preferred Stock (subject to adjustment from time to time for Recapitalizations

as set forth elsewhere herein), (iv) an annual rate of \$.01 per share for the Series D Preferred Stock (subject to adjustment from time to time for Recapitalizations as set forth elsewhere herein), (v) an annual rate of \$.01 per share for the Series D-1 Preferred Stock (subject to adjustment from time to time for Recapitalizations as set forth elsewhere herein), (vi) an annual rate of \$.01 per share for the Series E Preferred Stock (subject to adjustment from time to time for Recapitalizations as set forth elsewhere herein) and (vii) an annual rate of \$.01 per share for the Series E-1 Preferred Stock (subject to adjustment from time to time for Recapitalizations as set forth elsewhere herein).

(f) “*Liquidation Preference*” shall mean (i) \$1.00 per share for the Series A Preferred Stock (subject to adjustment from time to time for Recapitalizations and as otherwise set forth elsewhere herein), (ii) \$2.61 per share for the Series B Preferred Stock (subject to adjustment from time to time for Recapitalizations and as otherwise set forth elsewhere herein), (iii) \$3.63 per share for the Series C Preferred Stock (subject to adjustment from time to time for Recapitalizations and as otherwise set forth elsewhere herein), (iv) \$6.7799 per share for the Series D Preferred Stock (subject to adjustment from time to time for Recapitalizations and as otherwise set forth elsewhere herein), (v) \$5.4239 per share for the Series D-1 Preferred Stock (subject to adjustment from time to time for Recapitalizations and as otherwise set forth elsewhere herein), (vi) \$8.4515 per share for the Series E Preferred Stock (subject to adjustment from time to time for Recapitalizations and as otherwise set forth elsewhere herein) and (vii) \$6.7612 per share for the Series E-1 Preferred Stock (subject to adjustment from time to time for Recapitalizations and as otherwise set forth elsewhere herein).

(g) “*Options*” shall mean rights, options or warrants to subscribe for, purchase or otherwise acquire Common Stock or Convertible Securities.

(h) “*Original Issue Price*” shall mean (i) \$1.00 per share for the Series A Preferred Stock (subject to adjustment from time to time for Recapitalizations and as otherwise set forth elsewhere herein), (ii) \$2.61 per share for the Series B Preferred Stock (subject to adjustment from time to time for Recapitalizations and as otherwise set forth elsewhere herein), (iii) \$3.63 per share for the Series C Preferred Stock (subject to adjustment from time to time for Recapitalizations and as otherwise set forth elsewhere herein), (iv) \$6.7799 per share for the Series D Preferred Stock (subject to adjustment from time to time for Recapitalizations and as otherwise set forth elsewhere herein), (v) \$5.4239 per share for the Series D-1 Preferred Stock (subject to adjustment from time to time for Recapitalizations and as otherwise set forth elsewhere herein), (vi) \$8.4515 per share for the Series E Preferred Stock (subject to adjustment from time to time for Recapitalizations and as otherwise set forth elsewhere herein) and (vii) \$6.7612 per share for the Series E-1 Preferred Stock (subject to adjustment from time to time for Recapitalizations and as otherwise set forth elsewhere herein).

(i) “*Preferred Stock*” shall mean the Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock, Series D-1 Preferred Stock, Series E Preferred Stock and the Series E-1 Preferred Stock.

(j) “*Recapitalization*” shall mean any stock dividend, stock split, combination of shares, reorganization, recapitalization, reclassification or other similar event.

2. **Dividends.**

(a) **Preferred Stock.** In any calendar year, the holders of outstanding shares of Preferred Stock shall be entitled to receive dividends on a *pari passu* basis, when, as and if declared by the Board of Directors, out of any assets at the time legally available therefor, at the Dividend Rate specified for such shares of Preferred Stock payable in preference and priority to any declaration or payment of any Distribution on Common Stock of the Corporation in such calendar year. No Distributions shall be made with respect to the Common Stock unless dividends on the Preferred Stock have been declared in accordance with the preferences stated herein and all declared dividends on the Preferred Stock have been paid or set aside for payment to the Preferred Stock holders. The right to receive dividends on shares of Preferred Stock shall not be cumulative, and no right to dividends shall accrue to holders of Preferred Stock by reason of the fact that dividends on said shares are not declared or paid. Any accrual of dividends on the Preferred Stock shall not bear interest. Payment of any dividends to the holders of Preferred Stock shall be on a *pro rata, pari passu* basis in proportion to the Dividend Rates for each series of Preferred Stock.

(b) **Additional Dividends. Common Stock.** Dividends may be paid on the Common Stock when, as and if declared by the Board of Directors, subject to the prior dividend rights of the Preferred Stock. Notwithstanding the foregoing, in no event shall any dividend or other Distribution paid or payable on a share of Common Stock in any calendar year pursuant to this Section 2(b) exceed in value the dividend or other Distribution paid on a share of Series E Preferred Stock or Series E-1 Preferred Stock in such calendar year pursuant to Section 2(a).

(c) **Non-Cash Distributions.** Whenever a Distribution provided for in this Section 2 shall be payable in property other than cash, the value of such Distribution shall be deemed to be the fair market value of such property as determined in good faith by the Board of Directors.

(d) **Consent to Certain Distributions.** As authorized by Section 402.5(c) of the California Corporations Code, if Section 500(a) of the California Corporations Code is applicable to a payment made by the Corporation, then such applicable section of the California Corporations Code shall not apply if such payment is a payment made by the Corporation in connection with (i) repurchases of Common Stock issued to or held by employees, officers, directors or consultants of the Corporation or its subsidiaries upon termination of their employment or services pursuant to agreements providing for the right of said repurchase, (ii) repurchases of Common Stock issued to or held by employees, officers, directors or consultants of the Corporation or its subsidiaries pursuant to rights of first refusal contained in agreements providing for such right, (iii) repurchases of Common Stock or Preferred Stock in connection with the settlement of disputes with any stockholder, provided that any such settlement has been approved by the Board of Directors of the Corporation, or (iv) any other repurchase or redemption of Common Stock or Preferred Stock approved by at least a majority of the outstanding shares of Preferred Stock.

3. **Liquidation Rights.**

(a) **Preferred Stock Liquidation Preference.** In the event of any liquidation, dissolution or winding up of the Corporation, either voluntary or involuntary, the holders of the Series A Preferred Stock, Series B Preferred Stock, Series C Preferred Stock, Series D Preferred Stock, Series D-1 Preferred Stock, Series E Preferred Stock and Series E-1 Preferred Stock shall be entitled to receive on a *pari passu* basis, prior and in preference to any Distribution of any of the assets of the Corporation to the holders of the Common Stock by reason of their ownership of such stock, an amount

per share for each share of Preferred Stock held by them equal to the sum of (i) the Liquidation Preference specified for such share of Preferred Stock and (ii) all declared but unpaid dividends (if any) on each such share of Preferred Stock. If upon the liquidation, dissolution or winding up of the Corporation, the assets of the Corporation legally available for distribution to the holders of the Preferred Stock are insufficient to permit the payment to such holders of the full amounts specified in this Section 3(a), then the entire assets of the Corporation legally available for distribution shall be distributed with equal priority and *pro rata* among the holders of the Preferred Stock in proportion to the full amounts they would otherwise be entitled to receive pursuant to this Section 3(a).

(b) ***Remaining Assets.*** After the payment to the holders of Preferred Stock of the full preferential amounts specified above, the entire remaining assets of the Corporation legally available for distribution by the Corporation shall be distributed with equal priority and *pro rata* among the holders of the Common Stock in proportion to the number of shares of Common Stock held by them.

(c) ***Shares not Treated as Both Preferred Stock and Common Stock in any Distribution.*** Shares of Preferred Stock shall not be entitled to be converted into shares of Common Stock in order to participate in any Distribution, or series of Distributions, as shares of Common Stock pursuant to Section 3(c), without first foregoing participation in the Distribution, or series of Distributions, as shares of Preferred Stock pursuant to Section 3(a) or Section 3(b), as applicable. Notwithstanding the foregoing, if any shares of Preferred Stock would receive a greater Distribution upon conversion to Common Stock immediately prior to any liquidation, dissolution or winding up of the Corporation pursuant to Section 3(c) than they would otherwise receive (i.e., without conversion) pursuant to Section 3(a) or Section 3(b) (as applicable), then such shares of Preferred Stock shall automatically convert to Common Stock pursuant to Section 4(b) immediately prior to such any liquidation, dissolution or winding up of the Corporation.

(d) ***Reorganization.*** For purposes of this Section 3 and unless otherwise waived by the holders of a majority of the outstanding shares of Preferred Stock (voting together as a single class on an as-converted basis), a liquidation, dissolution or winding up of the Corporation shall be deemed to be occasioned by, or to include, (i) the acquisition of the Corporation by another entity by means of any transaction or series of related transactions to which the Corporation is party (including, without limitation, any stock acquisition, reorganization, merger or consolidation but excluding any sale of stock for capital raising purposes) other than a transaction or series of related transactions in which the holders of the voting securities of the Corporation outstanding immediately prior to such transaction or series of related transactions retain, immediately after such transaction or series of related transactions, as a result of shares in the Corporation held by such holders prior to such transaction or series of related transactions, at least a majority of the total voting power represented by the outstanding voting securities of the Corporation or such other surviving or resulting entity (or if the Corporation or such other surviving or resulting entity is a wholly-owned subsidiary immediately following such acquisition, its parent); (ii) a sale, lease, transfer, exclusive license or other disposition of all or substantially all of the assets of the Corporation and its subsidiaries taken as a whole by means of any transaction or series of related transactions, except where such sale, lease or other disposition is to a wholly-owned subsidiary of the Corporation; or (iii) any liquidation, dissolution or winding up of the Corporation, whether voluntary or involuntary.

(e) **Valuation of Non-Cash Consideration.** If any assets of the Corporation distributed to shareholders in connection with any liquidation, dissolution, or winding up of the Corporation are other than cash, then the value of such assets shall be their fair market value as reasonably determined in good faith by the Board of Directors, *except that* any publicly-traded securities to be distributed to shareholders in a liquidation, dissolution, or winding up of the Corporation shall be valued as follows:

(i) if the securities are then traded on a national securities exchange, then the value of the securities shall be deemed to be the average of the closing prices of the securities on such exchange over the ten (10) trading day period ending five (5) trading days prior to the Distribution;

(ii) if the securities are actively traded over-the-counter, then the value of the securities shall be deemed to be the average of the closing bid prices of the securities over the ten (10) trading day period ending five (5) trading days prior to the Distribution.

In the event of a merger or other acquisition of the Corporation by another entity, the Distribution date shall be deemed to be the date such transaction closes.

For the purposes of this subsection 3(e), “*trading day*” shall mean any day which the exchange or system on which the securities to be distributed are traded is open and “*closing prices*” or “*closing bid prices*” shall be deemed to be: (i) for securities traded primarily on the New York Stock Exchange, the American Stock Exchange or a Nasdaq market, the last reported trade price or sale price, as the case may be, at 4:00 p.m., New York time, on that day and (ii) for securities listed or traded on other exchanges, markets and systems, the market price as of the end of the regular hours trading period that is generally accepted as such for such exchange, market or system. If, after the date hereof, the benchmark times generally accepted in the securities industry for determining the market price of a stock as of a given trading day shall change from those set forth above, the fair market value shall be determined as of such other generally accepted benchmark times.

(f) **Allocation of Escrow and Contingent Consideration.** In the event of any liquidation, dissolution or winding up of the Corporation, if any portion of the consideration payable to the stockholders of the Corporation is payable only upon satisfaction of contingencies (the “*Additional Consideration*”), then (a) the portion of such consideration that is not Additional Consideration (such portion, the “*Initial Consideration*”) shall be allocated among the holders of capital stock of the Corporation in accordance with this Section 3 as if the Initial Consideration were the only consideration payable in connection with such liquidation, dissolution or winding up of the Corporation; and (b) any Additional Consideration which becomes payable to the stockholders of the Corporation upon satisfaction of such contingencies shall be allocated among the holders of capital stock of the Corporation in accordance with this Section 3 after taking into account the previous payment of the Initial Consideration as part of the same transaction and without consideration of any prior conversion or lack thereof of any series of Preferred Stock. For the purposes of this Section 3(f), consideration placed into escrow or retained as holdback to be available for satisfaction of indemnification or similar obligations in connection with such liquidation, dissolution or winding up of the Corporation shall be deemed to be Additional Consideration. For the avoidance of doubt, if the holders of Preferred Stock would receive more if converted to Common Stock upon payment of any

Additional Consideration, then the holders of Preferred Stock shall be deemed to have converted to Common Stock with respect to any such payment of Additional Consideration.

4. **Conversion.** The holders of the Preferred Stock shall have conversion rights as follows:

(a) **Right to Convert.** Each share of Preferred Stock shall be convertible, at the option of the holder thereof, at any time after the date of issuance of such share at the office of the Corporation or any transfer agent for the Preferred Stock, into that number of fully-paid, nonassessable shares of Common Stock determined by dividing the Original Issue Price for the relevant series by the Conversion Price for such series. (The number of shares of Common Stock into which each share of Preferred Stock of a series may be converted is referred to as the "**Conversion Rate**" for each such series.) Upon any decrease or increase in the Conversion Price for any series of Preferred Stock, as described in this Section 4, the Conversion Rate for such series shall be appropriately increased or decreased.

(b) **Automatic Conversion.** Each share of Preferred Stock shall automatically be converted into fully-paid, non-assessable shares of Common Stock at the then effective Conversion Rate for such share (i) immediately prior to the closing of a firm commitment underwritten initial public offering pursuant to an effective registration statement filed under the Securities Act of 1933, as amended (the "**Securities Act**"), covering the offer and sale of the Corporation's Common Stock and pursuant to which the Corporation receives aggregate gross proceeds of at least \$50,000,000, or (ii) upon vote or written consent by the holders of greater than fifty percent (50%) of the Preferred Stock then outstanding (voting as a single class and on an as-converted basis), or, if later, the effective date for conversion specified in such requests, provided that neither the Series D Preferred Stock nor the Series D-1 Preferred Stock shall be automatically converted pursuant to this Section 4(b)(ii) without the consent of a majority of the Series D Preferred Stock and Series D-1 Preferred Stock, voting together as a single class on an as-converted basis, and, provided, further, neither the Series E Preferred Stock nor the Series E-1 Preferred Stock shall be automatically converted pursuant to this Section 4(b)(ii) without the consent of a majority of the Series E Preferred Stock and Series E-1 Preferred Stock, voting together as a single class on an as-converted basis. In addition, each share of a series of Preferred Stock shall automatically be converted into fully-paid, non-assessable shares of Common Stock at the then effective Conversion Rate for such share immediately prior to the closing of a liquidation, dissolution or winding up of the Corporation described in Section 3(a) if such series of Preferred Stock would receive a greater Distribution on a converted basis pursuant to Section 3(c) than it would receive pursuant to Section 3(a) or Section 3(b) (as applicable). Each of the foregoing event and the events referred to in clauses (i) and (ii) above are referred to herein as an "**Automatic Conversion Event**".

(c) **Mechanics of Conversion.** No fractional shares of Common Stock shall be issued upon conversion of Preferred Stock. In lieu of any fractional shares to which the holder would otherwise be entitled, the Corporation shall pay cash equal to such fraction multiplied by the then fair market value of a share of Common Stock as determined by the Board of Directors. For such purpose, all shares of Preferred Stock held by each holder of Preferred Stock shall be aggregated, and any resulting fractional share of Common Stock shall be paid in cash. Before any holder of Preferred Stock shall be entitled to convert the same into full shares of Common Stock, and to receive certificates therefor, he shall either (A) surrender the certificate or certificates therefor, duly endorsed, at the office of the Corporation or of any transfer agent for the Preferred Stock or (B) notify the Corporation or its

transfer agent that such certificates have been lost, stolen or destroyed and execute an agreement satisfactory to the Corporation to indemnify the Corporation from any loss incurred by it in connection with such certificates, and shall give written notice to the Corporation at such office that he elects to convert the same; *provided, however*, that on the date of an Automatic Conversion Event, the outstanding shares of Preferred Stock shall be converted automatically without any further action by the holders of such shares and whether or not the certificates representing such shares are surrendered to the Corporation or its transfer agent; *provided further*, however, that the Corporation shall not be obligated to issue certificates evidencing the shares of Common Stock issuable upon such Automatic Conversion Event unless either the certificates evidencing such shares of Preferred Stock are delivered to the Corporation or its transfer agent as provided above, or the holder notifies the Corporation or its transfer agent that such certificates have been lost, stolen or destroyed and executes an agreement satisfactory to the Corporation to indemnify the Corporation from any loss incurred by it in connection with such certificates. On the date of the occurrence of an Automatic Conversion Event, each holder of record of shares of Preferred Stock shall be deemed to be the holder of record of the Common Stock issuable upon such conversion, notwithstanding that the certificates representing such shares of Preferred Stock shall not have been surrendered at the office of the Corporation, that notice from the Corporation shall not have been received by any holder of record of shares of Preferred Stock, or that the certificates evidencing such shares of Common Stock shall not then be actually delivered to such holder.

The Corporation shall, as soon as practicable after such delivery, or after such agreement and indemnification, issue and deliver at such office to such holder of Preferred Stock, a certificate or certificates for the number of shares of Common Stock to which the holder shall be entitled as aforesaid and a check payable to the holder in the amount of any cash amounts payable as the result of a conversion into fractional shares of Common Stock, plus any declared and unpaid dividends on the converted Preferred Stock. Such conversion shall be deemed to have been made immediately prior to the close of business on the date of such surrender of the shares of Preferred Stock to be converted, and the person or persons entitled to receive the shares of Common Stock issuable upon such conversion shall be treated for all purposes as the record holder or holders of such shares of Common Stock on such date; *provided, however*, that if the conversion is in connection with an underwritten offer of securities registered pursuant to the Securities Act or a merger, sale, financing, or liquidation of the Corporation or other event, the conversion may, at the option of any holder tendering Preferred Stock for conversion, be conditioned upon the closing of such transaction or upon the occurrence of such event, in which case the person(s) entitled to receive the Common Stock issuable upon such conversion of the Preferred Stock shall not be deemed to have converted such Preferred Stock until immediately prior to the closing of such transaction or the occurrence of such event.

(d) *Adjustments to Conversion Price for Diluting Issues.*

(i) *Special Definition.* For purposes of this Section 4(d), “*Additional Shares of Common Stock*” shall mean all shares of capital stock issued (or, pursuant to Section 4(d)(iii), deemed to be issued) by the Corporation after the filing of this Restated Certificate, other than issuances or deemed issuances of:

(1) shares of Common Stock upon the conversion of the Preferred Stock;

(2) shares of Common Stock issued or issuable to officers, directors and employees of, or consultants to, the Corporation pursuant to stock grants, option plans, purchase plans or other employee stock incentive programs or arrangements approved by the Board of Directors, or upon exercise of options or warrants granted to such parties pursuant to any such plan or arrangement;

(3) shares of Common Stock upon the exercise or conversion of Options or Convertible Securities outstanding as of the date of such filing;

(4) shares of Common Stock issued or issuable as a dividend or distribution on Preferred Stock or pursuant to any event for which adjustment is made pursuant to Section 4(e), 4(f) or 4(g) hereof;

(5) shares of Common Stock issued or issuable in a registered public offering under the Securities Act pursuant to which all outstanding shares of Preferred Stock are automatically converted into Common Stock pursuant to an Automatic Conversion Event;

(6) shares of Common Stock issued or issuable to banks, equipment lessors, real property lessors, financial institutions pursuant to a debt financing, commercial leasing or real property leasing transaction approved by the Board of Directors; and

(7) shares of Common Stock issued or issuable with the consent of the holders of a majority of the Preferred Stock, voting as a single class and on an as-converted basis.

(ii) ***No Adjustment of Conversion Price.*** No adjustment in the Conversion Price of a particular series of Preferred Stock shall be made in respect of the issuance of Additional Shares of Common Stock unless the consideration per share (as determined pursuant to paragraph 4(d)(v)) for the Additional Shares of Common Stock issued or deemed to be issued by the Corporation is less than the Conversion Price in effect on the date of, and immediately prior to such issue, for such series of Preferred Stock.

(iii) ***Deemed Issue of Additional Shares of Common Stock.*** In the event the Corporation at any time or from time to time after the date of the filing of this Restated Certificate shall issue any Options or Convertible Securities or shall fix a record date for the determination of holders of any class of securities entitled to receive any such Options or Convertible Securities, then the maximum number of shares (as set forth in the instrument relating thereto without regard to any provisions contained therein for a subsequent adjustment of such number) of Common Stock issuable upon the exercise of such Options or, in the case of Convertible Securities, the conversion or exchange of such Convertible Securities or, in the case of Options for Convertible Securities, the exercise of such Options and the conversion or exchange of the underlying securities, shall be deemed to have been issued as of the time of such issue or, in case such a record date shall have been fixed, as of the close of business on such record date, *provided* that in any such case in which shares are deemed to be issued:

(1) no further adjustment in the Conversion Price of any series of Preferred Stock shall be made upon the subsequent issue of Convertible Securities or shares of Common Stock in connection with the exercise of such Options or conversion or exchange of such Convertible Securities;

(2) if such Options or Convertible Securities by their terms provide, with the passage of time or otherwise, for any change in the consideration payable to the Corporation or in the number of shares of Common Stock issuable upon the exercise, conversion or exchange thereof (other than a change pursuant to the anti-dilution provisions of such Options or Convertible Securities such as this Section 4(d) or pursuant to Recapitalization provisions of such Options or Convertible Securities such as Sections 4(e), 4(f) and 4(g) hereof), the Conversion Price of each series of Preferred Stock and any subsequent adjustments based thereon shall be recomputed to reflect such change as if such change had been in effect as of the original issue thereof (or upon the occurrence of the record date with respect thereto);

(3) no readjustment pursuant to clause (2) above shall have the effect of increasing the Conversion Price of a series of Preferred Stock to an amount above the Conversion Price that would have resulted from any other issuances of Additional Shares of Common Stock and any other adjustments provided for herein between the original adjustment date and such readjustment date;

(4) upon the expiration of any such Options or any rights of conversion or exchange under such Convertible Securities which shall not have been exercised, the Conversion Price of each series of Preferred Stock computed upon the original issue thereof (or upon the occurrence of a record date with respect thereto) and any subsequent adjustments based thereon shall, upon such expiration, be recomputed as if:

(a) in the case of Convertible Securities or Options for Common Stock, the only Additional Shares of Common Stock issued were the shares of Common Stock, if any, actually issued upon the exercise of such Options or the conversion or exchange of such Convertible Securities and the consideration received therefor was the consideration actually received by the Corporation for the issue of such exercised Options plus the consideration actually received by the Corporation upon such exercise or for the issue of all such Convertible Securities which were actually converted or exchanged, plus the additional consideration, if any, actually received by the Corporation upon such conversion or exchange, and

(b) in the case of Options for Convertible Securities, only the Convertible Securities, if any, actually issued upon the exercise thereof were issued at the time of issue of such Options, and the consideration received by the Corporation for the Additional Shares of Common Stock deemed to have been then issued was the consideration actually received by the Corporation for the issue of such exercised Options, plus the consideration deemed to have been received by the Corporation (determined pursuant to Section 4(d)(v)) upon the issue of the Convertible Securities with respect to which such Options were actually exercised; and

(5) if such record date shall have been fixed and such Options or Convertible Securities are not issued on the date fixed therefor, the adjustment previously made in the Conversion Price which became effective on such record date shall be canceled as of the close of business on such record date, and thereafter the Conversion Price shall be adjusted pursuant to this Section 4(d)(iii) as of the actual date of their issuance.

(iv) ***Adjustment of Conversion Price Upon Issuance of Additional Shares of Common Stock.*** In the event this Corporation shall issue Additional Shares of Common Stock

(including Additional Shares of Common Stock deemed to be issued pursuant to Section 4(d)(iii)) without consideration or for a consideration per share less than the applicable Conversion Price of a series of Preferred Stock in effect on the date of and immediately prior to such issue, then, the Conversion Price of the affected series of Preferred Stock shall be reduced, concurrently with such issue, to a price (calculated to the nearest cent) determined by multiplying such Conversion Price by a fraction, the numerator of which shall be the number of shares of Common Stock outstanding immediately prior to such issue plus the number of shares which the aggregate consideration received by the Corporation for the total number of Additional Shares of Common Stock so issued would purchase at such Conversion Price, and the denominator of which shall be the number of shares of Common Stock outstanding immediately prior to such issue plus the number of such Additional Shares of Common Stock so issued. Notwithstanding the foregoing, the Conversion Price shall not be reduced at such time if the amount of such reduction would be less than \$0.01, but any such amount shall be carried forward, and a reduction will be made with respect to such amount at the time of, and together with, any subsequent reduction which, together with such amount and any other amounts so carried forward, equal \$0.01 or more in the aggregate. For the purposes of this Section 4(d)(iv), all shares of Common Stock issuable upon conversion of all outstanding shares of Preferred Stock and the exercise and/or conversion of any other outstanding Convertible Securities and all outstanding Options shall be deemed to be outstanding.

(v) **Determination of Consideration.** For purposes of this Section 4(d), the consideration received by the Corporation for the issue (or deemed issue) of any Additional Shares of Common Stock shall be computed as follows:

(1) **Cash and Property.** Such consideration shall:

(a) insofar as it consists of cash, be computed at the aggregate amount of cash received by the Corporation before deducting any reasonable discounts, commissions or other expenses allowed, paid or incurred by the Corporation for any underwriting or otherwise in connection with such issuance;

(b) insofar as it consists of property other than cash, be computed at the fair market value thereof at the time of such issue, as reasonably determined in good faith by the Board of Directors; and

(c) in the event Additional Shares of Common Stock are issued together with other shares or securities or other assets of the Corporation for consideration which covers both, be the proportion of such consideration so received, computed as provided in clauses (a) and (b) above, as reasonably determined in good faith by the Board of Directors.

(2) **Options and Convertible Securities.** The consideration per share received by the Corporation for Additional Shares of Common Stock deemed to have been issued pursuant to Section 4(d)(iii) shall be determined by dividing

(x) the total amount, if any, received or receivable by the Corporation as consideration for the issue of such Options or Convertible Securities, plus the minimum aggregate amount of additional consideration (as set forth in the instruments relating thereto, without regard to any provision contained therein for a subsequent adjustment of such consideration) payable

to the Corporation upon the exercise of such Options or the conversion or exchange of such Convertible Securities, or in the case of Options for Convertible Securities, the exercise of such Options for Convertible Securities and the conversion or exchange of such Convertible Securities by

(y) the maximum number of shares of Common Stock (as set forth in the instruments relating thereto, without regard to any provision contained therein for a subsequent adjustment of such number) issuable upon the exercise of such Options or the conversion or exchange of such Convertible Securities.

(e) ***Adjustments for Subdivisions or Combinations of Common Stock.*** In the event the outstanding shares of Common Stock shall be subdivided (by stock split, by payment of a stock dividend or otherwise), into a greater number of shares of Common Stock, the Conversion Price of each series of Preferred Stock in effect immediately prior to such subdivision shall, concurrently with the effectiveness of such subdivision, be proportionately decreased. In the event the outstanding shares of Common Stock shall be combined (by reclassification or otherwise) into a lesser number of shares of Common Stock, the Conversion Prices in effect immediately prior to such combination shall, concurrently with the effectiveness of such combination, be proportionately increased.

(f) ***Adjustments for Subdivisions or Combinations of Preferred Stock.*** In the event the outstanding shares of Preferred Stock or a series of Preferred Stock shall be subdivided (by stock split, by payment of a stock dividend or otherwise), into a greater number of shares of Preferred Stock, the Dividend Rate, Original Issue Price and Liquidation Preference of the affected series of Preferred Stock in effect immediately prior to such subdivision shall, concurrently with the effectiveness of such subdivision, be proportionately decreased. In the event the outstanding shares of Preferred Stock or a series of Preferred Stock shall be combined (by reclassification or otherwise) into a lesser number of shares of Preferred Stock, the Dividend Rate, Original Issue Price and Liquidation Preference of the affected series of Preferred Stock in effect immediately prior to such combination shall, concurrently with the effectiveness of such combination, be proportionately increased.

(g) ***Adjustments for Reclassification, Exchange and Substitution.*** Subject to Section 3, if the Common Stock issuable upon conversion of the Preferred Stock shall be changed into the same or a different number of shares of any other class or classes of stock, whether by capital reorganization, reclassification or otherwise (other than a subdivision or combination of shares provided for above), then, in any such event, in lieu of the number of shares of Common Stock which the holders would otherwise have been entitled to receive each holder of such Preferred Stock shall have the right thereafter to convert such shares of Preferred Stock into a number of shares of such other class or classes of stock which a holder of the number of shares of Common Stock deliverable upon conversion of such series of Preferred Stock immediately before that change would have been entitled to receive in such reorganization or reclassification, all subject to further adjustment as provided herein with respect to such other shares.

(h) ***Certificate as to Adjustments.*** Upon the occurrence of each adjustment or readjustment of the Conversion Price pursuant to this Section 4, the Corporation at its expense shall promptly compute such adjustment or readjustment in accordance with the terms hereof and furnish to each holder of Preferred Stock a certificate setting forth such adjustment or readjustment and showing in detail the facts upon which such adjustment or readjustment is based. The Corporation shall, upon the written request at any time of any holder of Preferred Stock, furnish or cause to be

furnished to such holder a like certificate setting forth (i) such adjustments and readjustments, (ii) the Conversion Price at the time in effect and (iii) the number of shares of Common Stock and the amount, if any, of other property which at the time would be received upon the conversion of Preferred Stock.

(i) ***Waiver of Adjustment of Conversion Price.*** Notwithstanding anything herein to the contrary, any downward adjustment of the Conversion Price of any series of Preferred Stock may be waived by the consent or vote of the holders of the majority of the outstanding shares of such series (with the Series D Preferred Stock and Series D-1 Preferred Stock voting as a single class, and the Series E Preferred Stock and Series E-1 Preferred Stock voting as a single class) either before or after the issuance causing the adjustment.

(j) ***Notices of Record Date.*** In the event that this Corporation shall propose at any time:

(i) to declare any Distribution upon its Common Stock, whether in cash, property, stock or other securities, whether or not a regular cash dividend and whether or not out of earnings or earned surplus;

(ii) to effect any reclassification or recapitalization of its Common Stock outstanding involving a change in the Common Stock; or

(iii) to voluntarily liquidate or dissolve or to enter into any transaction deemed to be a liquidation, dissolution or winding up of the corporation pursuant to Section 3(e);

then, in connection with each such event, this Corporation shall send to the holders of the Preferred Stock at least twenty (20) days' prior written notice of the date on which a record shall be taken for such Distribution (and specifying the date on which the holders of Common Stock shall be entitled thereto and, if applicable, the amount and character of such Distribution) or for determining rights to vote in respect of the matters referred to in (ii) and (iii) above.

Such written notice shall be given by first class mail (or express courier), postage prepaid or, to the extent consented to by a holder of Preferred Stock, electronic mail (with confirmation of receipt), addressed to each of the holders of Preferred Stock at the address for each such holder as shown on the books of the Corporation, and such notice shall be deemed given on the date such notice is mailed or sent by electronic mail. In the event a holder of Preferred Stock has provided notice to the Company of a preferred method of correspondence, the Company shall send such notices in such preferred form in addition to any other form of notice sent to such holder.

The notice provisions set forth in this section may be shortened or waived prospectively or retrospectively by the consent or vote of the holders of a majority of the Preferred Stock, voting as a single class and on an as-converted basis.

(k) ***Reservation of Stock Issuable Upon Conversion.*** The Corporation shall at all times reserve and keep available out of its authorized but unissued shares of Common Stock solely for the purpose of effecting the conversion of the shares of the Preferred Stock, such number of its shares of Common Stock as shall from time to time be sufficient to effect the conversion of all then outstanding shares of the Preferred Stock; and if at any time the number of authorized but unissued shares of Common Stock shall not be sufficient to effect the conversion of all then outstanding shares

of the Preferred Stock, the Corporation will take such corporate action as may, in the opinion of its counsel, be necessary to increase its authorized but unissued shares of Common Stock to such number of shares as shall be sufficient for such purpose.

5. Voting.

(a) ***Restricted Class Voting.*** Except as otherwise expressly provided herein or as required by law, the holders of Preferred Stock and the holders of Common Stock shall vote together and not as separate classes.

(b) ***No Series Voting.*** Other than as provided herein or required by law, there shall be no series voting.

(c) ***Preferred Stock.*** Each holder of Preferred Stock shall be entitled to the number of votes equal to the number of shares of Common Stock into which the shares of Preferred Stock held by such holder could be converted as of the record date. The holders of shares of the Preferred Stock shall be entitled to vote on all matters on which the Common Stock shall be entitled to vote. Holders of Preferred Stock shall be entitled to notice of any shareholders' meeting in accordance with the Bylaws of the Corporation. Fractional votes shall not, however, be permitted and any fractional voting rights resulting from the above formula (after aggregating all shares into which shares of Preferred Stock held by each holder could be converted), shall be disregarded.

(d) ***Election of Directors.*** Subject to the provisions of the Corporation's Fourth Amended and Restated Voting Rights Agreement, as the same may be amended from time to time, so long as at least ten percent (10%) of the shares of Series D Preferred Stock and Series D-1 Preferred Stock originally issued remain outstanding, the holders of Series D Preferred Stock and Series D-1 Preferred Stock, voting together as a separate class on an as-converted basis, shall be entitled to elect one (1) member of the Corporation's Board of Directors at each meeting or pursuant to each consent of the Corporation's shareholders for the election of directors. So long as at least ten percent (10%) of the shares of Series C Preferred Stock originally issued remain outstanding, the holders of Series C Preferred Stock, voting as a separate class, shall be entitled to elect one (1) member of the Corporation's Board of Directors at each meeting or pursuant to each consent of the Corporation's shareholders for the election of directors. So long as at least ten percent (10%) of the shares of Series A Preferred Stock and Series B Preferred Stock originally issued remain outstanding, the holders of Series A Preferred Stock and Series B Preferred Stock, voting as a separate class on an as-converted basis, shall be entitled to elect one (1) member of the Corporation's Board of Directors at each meeting or pursuant to each consent of the Corporation's shareholders for the election of directors. The holders of Common Stock, voting as a separate class, shall be entitled to elect two (2) members of the Corporation's Board of Directors at each meeting or pursuant to each consent of the Corporation's shareholders for the election of directors. Any additional members of the Corporation's Board of Directors shall be elected by the holders of a majority of Common Stock and Preferred Stock (on an as-converted basis), voting together as a single class.

(e) ***Common Stock.*** Each holder of shares of Common Stock shall be entitled to one vote for each share thereof held. Fractional votes shall not, however, be permitted and any fractional voting rights resulting from the above formula shall be disregarded. The holders of the Common Stock are entitled to one vote for each share of Common Stock held at all meetings of

stockholders (and written actions in lieu of meetings). The number of authorized shares of Common Stock may be increased or decreased (but not below the number of shares thereof then outstanding) by (in addition to any vote of the holders of one or more series of Preferred Stock that may be required by the terms of this Restated Certificate) the affirmative vote of the holders of shares of capital stock of the Corporation representing a majority of the votes represented by all outstanding shares of capital stock of the Corporation (voting together as a single class on an as-converted basis), irrespective of the provisions of Section 242(b)(2) of the General Corporation Law, and without a separate class vote of the holders of the Common Stock.

(f) **Committee.** The Board of Directors, through unanimous consent, shall have the right to establish any committee of directors as the Board of Directors shall deem appropriate from time to time. Subject to applicable law, committees of the Board of Directors shall have the rights, powers and privileges granted to such committee by the Board of Directors from time to time. Any delegation of authority to a committee of directors to take any action must be approved in the same manner as would be required for the Board of Directors to approve such action directly.

6. **Amendments and Changes.** So long as at least 200,000 shares of the Preferred Stock originally issued remain issued and outstanding, the Corporation shall not, without first obtaining the approval (by vote or written consent as provided by law) of the holders of at least a majority of the outstanding shares of the Preferred Stock (calculated on an as-converted basis):

(a) increase or decrease the authorized number of shares of Common Stock or Preferred Stock or any series thereof (other than a decrease of the authorized number of shares of Preferred Stock resulting from conversion of certain shares of Preferred Stock);

(b) effect an exchange, reclassification or cancellation of all or part of the Preferred Stock;

(c) alter or change the rights, preferences or privileges of the shares the Preferred Stock so as to affect adversely the rights, preferences, privileges or powers of such shares;

(d) authorize, create (by reclassification or otherwise) or issue, or obligate itself to issue, any other equity security, including any other security convertible into or exercisable for any equity security, having rights, preferences or privileges senior to or on a parity with the Series E Preferred Stock;

(e) redeem, purchase or otherwise acquire (or pay into or set aside for a sinking fund for such purpose) any share or shares of Preferred Stock or Common Stock or any capital stock of any subsidiary of the Corporation; provided, however, that this restriction shall not apply to the repurchase of shares of Common Stock from employees, officers, directors, consultants or other persons performing services for the Corporation or any subsidiary pursuant to agreements under which the Corporation has the option to repurchase such shares at cost upon the termination of employment or applicable service relationship, in each case, approved by the Corporation's Board of Directors;

(f) (i) approve any sale of all or substantially all of the assets of the Corporation, (ii) approve any sale, transfer, assignment, conveyance or other disposition (including by merger or consolidation) in one transaction or a series of related transactions of more than fifty percent (50%) of the issued and outstanding shares of the Corporation's stock immediately following such transaction

or series of related transactions), (iii) grant an exclusive license to the material intellectual property assets of the Corporation, (iv) authorize the reorganization, liquidation, dissolution or winding up of the Corporation or any of its subsidiaries;

(g) declare or pay any distribution or dividend with respect to the Preferred Stock or Common Stock or any capital stock of any subsidiary of the Corporation;

(h) increase or decrease the number of members serving on the Corporation's Board of Directors;

(i) enter into any material transaction or adopt a material amendment or other modification to any such transaction (other than the advancement of expenses, issuance of options or other equity pursuant to an equity compensation plan or redeem or repurchase shares of Common Stock as contemplated by Section 6(e), in each case in the ordinary course of business and consistent with past practice) with any affiliate of the Corporation, provided that any issuance, redemption or repurchase of securities or any distribution or other payment to an affiliate of the Corporation shall be transacted at the lower of (i) the fair market value or (ii) cost, in any case, as determined by the Board of Directors;

(j) issue, incur or guarantee any indebtedness other than trade credit incurred or advances of expenses, in each case in the ordinary course of business and consistent with past practice;

(k) acquire a material amount of assets through a merger or purchase of all or substantially all of the assets or capital stock or other ownership interests of another entity;

(l) increase the number of shares of Common Stock or Preferred Stock authorized for issuance under any stock plan or arrangement for the benefit of employees, officers, directors, consultants or other persons performing services for the Corporation or any subsidiary unless such increase is approved by a majority of the Board of Directors, including at least two of the directors elected by the holders of Preferred Stock;

(m) create any new stock plan or arrangement for the benefit of employees, officers, directors, consultants or other persons performing services for the Corporation or any subsidiary and authorize the amount of securities issuable thereunder unless such new plan is approved by a majority of the Board of Directors, including at least two of the directors elected by the holders of Preferred Stock; or

(n) amend, alter or repeal any provision of the then-current Certificate of Incorporation or the Bylaws of the Corporation.

7. **Additional Protective Provisions.** The Corporation shall not amend, alter or repeal any provision of the then-current Certificate of Incorporation or the Bylaws of the Corporation in a manner that affects adversely the powers, preferences or rights of a particular series of Preferred Stock differently and disproportionately as compared with any other series of Preferred Stock without first obtaining the approval (by vote or written consent as provided by law) of the holders of at least a majority of the outstanding shares of such affected series of Preferred Stock (with Series D Preferred Stock and Series D-1 Preferred Stock and Series E Preferred Stock and Series E-1 Preferred Stock, respectively, calculated on an as-converted basis). For the avoidance of doubt, creation of a series of

preferred stock of the Corporation that is senior or *pari passu* to all series of Preferred Stock shall not in itself be deemed to affect adversely the powers, preferences or rights of a particular series of Preferred Stock.

8. **Reissuance of Preferred Stock.** In the event that any shares of Preferred Stock shall be converted pursuant to Section 4 or otherwise repurchased by the Corporation, the shares so converted or repurchased shall be cancelled and shall not be issuable by this Corporation.

9. **Notices.** Any notice required by the provisions of this ARTICLE IV to be given to the holders of Preferred Stock shall be deemed given if deposited in the United States mail, postage prepaid or, to the extent consented to by a holder of Preferred Stock, electronic mail (with confirmation of receipt), and addressed to each holder of record at such holder's address appearing on the books of the Corporation. In the event a holder of Preferred Stock has provided notice to the Company of a preferred method of correspondence, the Company shall send such notices in such preferred form in addition to any other form of notice sent to such holder.

ARTICLE V

1. **Limitation of Directors' Liability.** To the fullest extent permitted by law, a director of the Corporation shall not be personally liable to the Corporation or its stockholders for monetary damages for breach of fiduciary duty as a director. For the avoidance of doubt, any disinterested failure to satisfy Section 365 of the DGCL shall not, for the purposes of Section 102(b)(7) or Section 145 of the DGCL, or for the purposes of any use of the term "good faith" in this Restated Certificate or the Bylaws in regard to the indemnification or advancement of expenses of officers, directors employees and agents, constitute an act or omission not in good faith, or a breach of the duty of loyalty. Any repeal or modification of this ARTICLE V shall not adversely affect any right or protection of a director of the Corporation existing at the time of such repeal or modification. If the DGCL or any other law of the State of Delaware is amended after approval by the stockholders of this ARTICLE V to authorize corporate action further eliminating or limiting the personal liability of directors, then the liability of a director of the Corporation shall be eliminated or limited to the fullest extent permitted by the DGCL as so amended.

2. **Indemnification of Corporate Agents.** To the fullest extent permitted by applicable law, the Corporation is authorized to provide indemnification of (and advancement of expenses to) directors, officers and agents of the Corporation (and any other persons to which the DGCL permits the Corporation to provide indemnification) through Bylaw provisions, agreements with such agents or other persons, vote of stockholders or disinterested directors or otherwise, in excess of the indemnification and advancement otherwise permitted by Section 145 of the DGCL.

3. **Repeal or Modification.** Neither any amendment nor repeal of this ARTICLE V, nor the adoption of any provision of this Restated Certificate inconsistent with this ARTICLE V, shall eliminate or reduce the effect of this ARTICLE V, in respect of any matter occurring, or any action or proceeding accruing or arising or that, but for this ARTICLE V, would accrue or arise, prior to such amendment, repeal or adoption of an inconsistent provision.

ARTICLE VI

Elections of directors need not be by written ballot unless a shareholder demands election by ballot at the meeting and before the voting begins or unless the Bylaws of the Corporation shall so provide.

ARTICLE VII

Unless otherwise set forth herein, the number of directors that constitute the Board of Directors of the Corporation shall be fixed by, or in the manner provided in, the Bylaws of the Corporation.

ARTICLE VIII

In furtherance and not in limitation of the powers conferred by statute, the Board of Directors of the Corporation is expressly authorized to adopt, amend or repeal the Bylaws of the Corporation.

ARTICLE IX

The Corporation renounces, to the fullest extent permitted by law, any interest or expectancy of the Corporation in, or in being offered an opportunity to participate in, any Excluded Opportunity. An "*Excluded Opportunity*" is any matter, transaction or interest that is presented to, or acquired, created or developed by, or which otherwise comes into the possession of PepsiCo, Inc. (in its capacity as a shareholder or Board observer or otherwise) or any partner, member, director, stockholder, employee, affiliate or agent thereof (collectively, "*Covered Persons*"), unless such matter, transaction or interest is presented to, or acquired, created or developed by, or otherwise comes into the possession of, a Covered Person expressly and solely in such Covered Person's capacity as an observer on the Board of the Corporation. Neither PepsiCo, Inc. nor any Covered Person is obligated to present any Excluded Opportunity to the Corporation or any of its subsidiaries.

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